

Before The
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 76.51)
of the Commission's Rules to Include)
Newton, New Jersey and Riverhead,)
New York in the New York, New York)
Linden-Paterson-Newark, New Jersey)
Television Market)

MM Docket No. 93-290

To the Commission:

COMMENTS OF U.S. CABLEVISION CORPORATION
IN OPPOSITION TO NOTICE OF PROPOSED RULEMAKING

U.S. Cablevision Corporation ("U.S. Cablevision"), by its attorneys, hereby submits its Comments in opposition to the above-captioned Notice of Proposed Rulemaking ("NPRM") which proposes to modify Section 76.51 of the rules to add Newton, New Jersey and Riverhead, New York, and possibly other stations in Connecticut, New Jersey and New York, to the New York-Linden-Paterson-Newark hyphenated market (#1). U.S. Cablevision operates a technically integrated cable system which serves Beacon, New York and a number of surrounding communities and which is partially within the New York market; accordingly, the system will be directly affected by the outcome of this proceeding.

The NPRM responds to petitions by Mountain Broadcasting Corporation (WMBC-TV, Channel 63, Newton, New Jersey) and WLIG-TV, Inc. (WLIG(TV), channel 55, Riverhead, New York) which seek to have their city of license added to the New York hyphenated market. On its own motion, the Commission

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has also asked for comment on whether Section 76.51 should also be amended to include other stations assigned to the ADI but not currently part of the hyphenated market; these would include stations licensed to Bridgeport, Connecticut; Secaucus, New Jersey and Kingston, Poughkeepsie and Smithtown, New York. The proposed amendment (1) fails to satisfy Commission criteria for amendment of the hyphenated market list and for modification of ADI markets; (2) creates a potentially irreconcilable conflict with a pending rulemaking before the Copyright Office; and (3) illustrates the complex and disruptive "domino effect" which results from the addition of new communities to existing markets. U.S. Cablevision urges the Commission not to adopt the proposed amendment to Section 76.51.

I. THE PROPOSED AMENDMENT TO SECTION 76.51 FAILS TO MEET CRITERIA FOR REDESIGNATION OF A HYPHENATED TELEVISION MARKET

The Commission has articulated the following factors to be considered in evaluating request for the addition of a community to hyphenated markets: (1) the distance between existing designated communities and communities to be added; (2) whether cable carriage would extend beyond the added station's Grade B contour; (3) clear showing of particularized need by the requesting station; and (4) public interest benefits from the proposed hyphenation. The

proposed addition of new communities to the New York hyphenated market fails to meet each of these criteria.

For example, the communities served by U.S. Cablevision fall well outside the WLIG(TV) Grade B contour. Moreover, the station's contour fails to even reach New York City -- the heart of the designated market; the reference point for Riverhead is over 70 miles from the reference point for New York and even further from the existing designated market communities in New Jersey. The distance between Riverhead and Newton, should the Commission grant both petitions, is 109.5 miles. If, as the Commission suggests, other communities besides Riverhead and Newton are added, a mega-market ranging from Bridgeport, Connecticut to Riverhead, New York to Linden, New Jersey to Kingston, New York will be created. The distances between these communities are simply too great to justify such a widely separated and diverse regional market.

Second, the petitions fail to demonstrate a particularized need for the proposed market redesignation. Both petitions assert that they seek redesignation so as to broaden the area in which the stations would not incur liability under the copyright compulsory license. U.S. Cablevision submits that this reason, which is solely for the private financial benefit of the stations, does not justify

redesignation. In its Report and Order^{1/} adopting new must-carry rules, the Commission declined to adopt a comprehensive revision to the Section 76.51 list of top 100 television markets on the grounds that "[w]holesale changes in or reranking the markets on the list would have significant implications for copyright liability."^{2/} The Commission's unwillingness to make changes in the market list suggests that it did not consider relieving distant signals from copyright liability a particularly important objective.

Both petitions assert that the stations air locally produced programming. While such programming may be of interest to local viewers, it is unclear at best that the station's would appeal to audiences in the Hudson River Valley communities served by U.S. Cablevision.

Similarly, the stations fail to meet the standards which the Commission has enunciated for ADI modification; while these considerations overlap somewhat the criteria for hyphenated market redesignation, they also focus on other relevant issues:^{3/}

1) Whether the station has historically been carried on cable systems within the market;

^{1/} Report and Order, MM Docket No. 92-259, 8 FCC Rcd (1993).

^{2/} 8 FCC Rcd at 2978.

^{3/} Report and Order, 8 FCC Rcd at 2976.

2) Whether the station is located close to the cable community in mileage or signal coverage;

3) Whether any other station provides news or other programming of local interest; and

4) Local viewing patterns in cable and noncable homes in the cable community.

The U.S. Cablevision system has not historically carried either of the stations; the distance from the station's headend is 51.3 miles to Newton and 77.8 miles to Riverhead.

II. DENIAL OF THE PETITIONS FOR MARKET REDESIGNATION WILL AVOID POTENTIALLY INCONSISTENT RESULTS WITH A PENDING COPYRIGHT OFFICE RULEMAKING PROCEEDING

In response to the Commission's new must-carry rules, the Copyright Office recently commenced a Notice of Inquiry ("NOI") seeking comment on whether it should adhere to the Commission's recent and potential future changes to Section 76.51.^{4/} Specifically, the Copyright Office is considering the effect of the Commission's renamed markets on the cable compulsory license, and whether the Copyright Office should accept recent and future redesignations. As stated in its NOI, "the Office does not necessarily share the Commission's view that it has 'traditionally' followed changes in the

^{4/} 58 Fed. Reg. 34594 (1993) (proposed June 28, 1993).

§ 76.51 list, or that 'Congress intended for our [FCC] updated Section 76.51 list to be applied to assess copyright liability.'^{5/}

Changes to Section 76.51 would eliminate copyright indemnification as a prerequisite to must-carry eligibility for many television stations that are not currently "local" signals for copyright purposes with respect to cable systems. Eliminating the compulsory license fees for television stations whose signals are not deemed "local" for copyright purposes will significantly reduce the royalty payments program suppliers, and in turn, copyright owners have come to expect. In light of this, the Copyright Office may refuse to acknowledge the Commission's changes to Section 76.51, including the redesignation of the New York television market. Thus, grant of the petitions prior to the conclusion of the Copyright Office rulemaking, might produce the anomalous result of the stations being declared local signals, and thus relieved of compulsory copyright liability under the Commission's rules, but not according to the Copyright Office. Cable systems throughout the New York ADI, including U.S. Cablevision, for which these stations are currently copyright distant signals, could incur significant additional copyright expense solely because of the FCC's ruling.

^{5/} 50 Fed Reg. at 34596 quoting Report and Order at 2979.

U.S. Cablevision therefore urges the Commission to conserve its resources and wait for the conclusion of the Copyright Office inquiry before proceeding further with this rulemaking. Because the Copyright Office proceeding may moot the request for market redesignation, failure to wait could yield inconsistent and improvident results.^{6/}

III. THE HYPHENATED MARKET SHOULD NOT BE REDESIGNATED TO INCLUDE ALL ADI STATIONS

Although this proceeding was initiated by two individual petitions, the Commission has asked for comment as to whether all stations in the ADI should be included in the market redesignation. NPRM at ¶15. This proposal simply illustrates the complexity and illogic of wholesale revisions to Section 76.51. As previously noted, the Commission refrained from such wholesale changes in the must-carry Report and Order; to do so on a piece-meal basis simply accomplishes the same result indirectly and creates the same problems. Moreover, given the size and breadth of the New York market, inclusion of all ADI stations as designated 35-mile zones in the hyphenated market may well have anomalous consequences for stations and cable systems in adjoining

^{6/} At a minimum, if the Commission determines to amend § 76.51 in this and similar proceedings, it should condition such relief on the express agreement of affected stations to reimburse cable operators for any copyright liability in the event of an inconsistent Copyright Office determination in its related proceeding.

markets. For example, inclusion of Kingston and Poughkeepsie will extend the reach of the New York cable market into the designated zone of the Albany-Schenectady-Troy market. Similarly, inclusion of Bridgeport will impact the Hartford-New Haven-Waterbury-New Britain market. In short, the Commission's suggestion to consider adding still other communities is a step onto the proverbial "slippery slope" which could have unforeseen and unintended consequences; that step should not be taken.

IV. CONCLUSION

As noted above, the petitioning stations have failed to demonstrate a compelling basis for adding them to the New York hyphenated market. Even more problematic is the possible addition of other geographically and otherwise separate communities to the market. The petitioners' objectives can be accomplished and the adverse and unintended consequences avoided if the petitioners, and other interested stations, elected to pursue, as they should, determinations of significant viewing throughout the market. Establishment of significantly viewed status will result in the stations being treated as local for copyright purposes. This approach, which numerous other stations have undertaken, provides a simple and straight-forward mechanism to achieve the intended result without the complexities caused by an

across-the-board application of a market redesignation. Accordingly, inasmuch as this remedy is readily available and, in contrast to a mechanical amendment of Section 76.51, is reflective of actual viewing patterns in particular markets, U.S. Cablevision urges the Commission to deny the petitions and terminate this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 1993, I caused copies of the foregoing "COMMENTS OF U.S. CABLEVISION CORPORATION IN OPPOSITION TO NOTICE OF PROPOSED RULEMAKING" to be mailed via first-class postage prepaid mail to the following:

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